

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>BRIAN L. DEMING</b>	)	
Claimant	)	
VS.	)	
	)	
<b>NATIONAL COOP REFINERY</b>	)	Docket No. 201,932
Respondent	)	
AND	)	
	)	
<b>LIBERTY MUTUAL INSURANCE COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant appeals the post-award Order of Administrative Law Judge Bruce E. Moore dated February 18, 2003, wherein claimant's counsel was awarded \$1,000 as attorneys fees taxed as costs to the respondent and its insurance carrier. Claimant's attorney alleges he is entitled to a substantially higher amount based upon his affidavit and the attached printouts.

**ISSUES**

Claimant's Application for Review filed with the Kansas Workers Compensation Appeals Board (Board) lists the following issues:

- "(1) That the order for post award attorney fees, dated February 18, 2003, was contrary to the provisions of K.S.A. 44-536(g) and 44-510K [sic], as the order failed to reasonably compensate Claimant's attorney and recover costs and expenses after Claimant successfully obtained post award benefits.
- "(2) The February 18, 2003 post award order failed to enter any findings of fact or conclusions of law that would suggest any basis for not awarding fees, expenses and costs sought pursuant to K.S.A. 44-536(g) and K.S.A. 44-510K [sic] by Claimant and Claimant's counsel.

- “(3) The award of attorney fees and expenses as meted out by the ALJ were so grossly inadequate as to deny Claimant reasonable access to workers’ compensation benefits granted to him, so as to deny Claimant his rights of due process and deny him a property right protected by the Kansas Constitution and the U.S. Constitution.”

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the entire evidentiary file contained herein, the Board finds the Order of the Administrative Law Judge should be modified to award claimant \$2,700 in attorney fees and costs as below discussed. This matter originally went before the Administrative Law Judge upon claimant’s motion for post-award medical care. The Administrative Law Judge in his Post-Award Medical Award of January 17, 2003, awarded a portion of claimant’s post-award medical request, but denied several of claimant’s requests. Claimant’s attorney was then instructed to submit an affidavit in support of his claim for post-award attorney fees, which was accomplished on February 10, 2003. The affidavit, with the attached time sheets, listed time and hours involved for a total attorney fees claim in the amount of 47 hours at \$115 per hour totaling \$5,405. Also attached were expense sheets showing expenses in the amount of \$1,347.46. The Administrative Law Judge, as noted above, awarded claimant’s attorney \$1,000 in attorney fees, with no expenses included.

In reviewing the Post-Award Medical Award, the Board notes the Administrative Law Judge’s criticism of claimant and his lack of cooperation with several authorized health care providers. Claimant seemed obsessed with Bernard Abrams, M.D., in Kansas City, utilizing his services at claimant’s own expense while ignoring health care providers authorized by respondent. In fact, several of the disputes regarding what, if any, treatment claimant should be provided arose as a result of what the Administrative Law Judge, quoting Dr. Carabetta, described as Dr. Abrams’ “wish list luxury items.”

It is obvious from his commentary the Administrative Law Judge felt a substantial portion of the dispute in this matter was generated by claimant and his own less-than-cooperative actions. However, the award of \$1,000 in attorney fees was provided in a one-sentence order, with no explanation.

K.S.A. 44-536(g) allows for attorney fees, post award, in certain situations.

If such services involve no additional award of disability compensation, but result in an additional award of medical compensation, penalties, or other benefits, the director shall fix the proper amount of such attorney fees in accordance with this subsection and such fees shall be paid by the employer or the workers compensation fund, if the fund is liable for compensation pursuant to K.S.A. 44-567 and amendments thereto, to the extent of the liability of the fund. If the services

rendered herein result in a denial of additional compensation, the director may authorize a fee to be paid by the respondent.<sup>1</sup>

The Board acknowledges that post-award attorney fees to claimants' attorneys serve a significant purpose.

While this provision is certainly a bitter pill for an employer or his insurer to swallow, it is necessary to assure continued representation of claimant after an award. An additional benefit accrues to all concerned from this added incentive on the part of respondent to resolve post-award disputes without protracted litigation.<sup>2</sup>

In reviewing the affidavit and attached lists, the Board finds it somewhat disturbing that 47 hours of labor was required for a motion for additional medical treatment. The time sheet contains numerous reviews of the file, telephone conferences with the clients and telephone conferences with the other attorneys. The Board finds that an appropriate fee in this situation would be \$2,700.

K.S.A. 44-536 makes no mention of expenses when discussing attorneys fees. However, K.S.A. 44-510k(c) does allow for the awarding of costs when post-award litigation occurs on a claimant's behalf. "Costs" as described by that statute are defined as including,

[B]ut are not limited to, witness fees, mileage allowances, any costs associated with the reproduction of documents that become a part of the hearing record, the expense of making a record of the hearing and such other charges as are by statute authorized to be taxed as costs.

The language of K.S.A. 44-510k(c) indicates that the list is not all inclusive. Items contained in the statute are noted as being "not limited to." As such, the Board finds that the attorney fees, mileage expenses and the telephone expenses may be awarded to claimant's attorney in this matter. K.S.A. 44-510k(c), which was created by the legislature on July 1, 2000, applies to claimant's Application For Post Award Medical filed with the Division on May 29, 2002. Thus, even if that section of the statute is considered a substantive legislative modification, it would still apply to this application for post-award medical treatment.

Therefore, the Board awards the sum of \$331.52 in mileage expenses for the attorney's travel and \$20.94 in miscellaneous expenses for the long distance telephone calls. The Board, however, denies claimant's request for the costs associated with

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<sup>1</sup> K.S.A. 44-536(g).

<sup>2</sup> Timothy J. Short, *Attorney Fees for Representing a Claimant After Final Award*, Journal of the Kansas Trial Lawyers Association, Vol. XIII, No. 2, p. 13 (1989).

obtaining the testimony of Bernard Abrams, M.D. K.S.A. 44-553 (Furse 1993) allows witness fees for witnesses who appear in response to a subpoena. Dr. Abrams was not subpoenaed for this testimony. Therefore, that statute would not apply. Additionally, even under the Code of Civil Procedure, fees charged by treating physicians for appearance and testimony at trial are generally not assessed against the losing party as costs.<sup>3</sup>

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Bruce E. Moore dated February 18, 2003, should be and hereby is modified to award claimant's counsel the sum of \$2,700 as attorney fees, costs for mileage for travel in the amount of \$331.52 and miscellaneous office expenses for long distance telephone calls in the amount of \$20.94, with such sums to be taxed as costs to the respondent and its insurance carrier. The expenses requested by claimant's attorney are denied.

### **IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October 2003.

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BOARD MEMBER

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### **DISSENT**

This Board Member objects to the awarding of attorney travel mileage and office expenses in the above matter. K.S.A. 44-536 (Furse 1993) makes no mention of costs or expenses in awarding attorney fees for post-award litigation.

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<sup>3</sup> *Grant v. Chappell*, 22 Kan. App. 2d 398, 916 P.2d 723 (1996).

This Board Member acknowledges that K.S.A. 44-510k(c) allows for the awarding of attorney fees and costs consistent with subsection (g) of K.S.A. 44-536. However, that particular section of K.S.A. 44-510k was not created by the Kansas legislature until July of 2000. That provision would be substantive, rather than procedural, and would, therefore, apply only to accidents occurring after the date of its creation. The date of accident in this matter is August 31, 1994. Even if one were to use the date of the creation of the contract between claimant and his attorney, the substantive nature of that statute would still preclude its application to this situation. This Board Member would, therefore, deny the attorney travel mileage expenses and the miscellaneous telephone expenses awarded by the majority.

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BOARD MEMBER

c: Andrew L. Oswald, Attorney for Claimant  
Douglas D. Johnson, Attorney for Respondent  
Bruce E. Moore, Administrative Law Judge  
Paula S. Greathouse, Director